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No. 786

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF

The Supreme Court of the United States

* * *

E. D. WOODLOCK, ET AL, *Petitioners*

VS.

CITY OF ABILENE, *Respondent*

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE 11TH SUPREME JUDICIAL DISTRICT OF TEXAS

* * *

SCARBOROUGH, YATES,
SCARBOROUGH & BLACK
Abilene, Texas

BY DALLAS SCARBOROUGH
Counsel for Petitioners

ABILENE PTG. & STATIONERY CO.

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No._____

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E. D. WOODLOCK, ET AL, *Petitioners*

VS.

CITY OF ABILENE, *Respondent*

* * *

Opinions Below

The judgment of the District Court is not reported. A copy thereof is attached hereto in the Appendix as Exhibit A. The opinion of the Court of Civil Appeals is reported in 282 SW 2d 736. A copy thereof is attached hereto as Exhibit D. The Supreme Court of Texas rendered no opinion but affirmed the opinion of the Court of Civil Appeals by refusing the Application for Writ of Error to Said Court, and also by overruling the Motion for Rehearing on said Application for Writ of Error.

Jurisdiction

The date of the Judgment of the Court of Civil Appeals, which is the judgment sought to be reviewed, is September 9th, 1955, which judgment was entered the same day. The Motion for Rehearing in the Court of Civil Appeals was overruled on October 21st, 1955, and entered the same day. The

date of the refusal of the Application for Writ of Error by the Supreme Court of Texas is January 4th, 1956, and entered the same day. The date of the overruling of the Motion for Rehearing by the Supreme Court of Texas is February 8th, 1956, and entered the same day. The Jurisdiction of this Court is invoked under 62 STAT. 929, 28 U. S. C. 1257, Subsection (3). This is a case wherein a State Court has decided a federal question of substance not theretofore determined by the Supreme Court of the United States. The judgment sought to be reviewed is a final judgment of the Court of Civil Appeals and since the Supreme Court refused to review the decision, the Court of Civil Appeals is the highest Court of the State of Texas in which a decision in this case could be had.

Question Presented For Review

Is an ordinance of a municipal corporation, acting under its police power, which absolutely prohibits parking on a business street within the city limits, and which prohibition seriously damages the cash market value of the business property of abutting owners, void because it contravenes the constitutional provision prohibiting the deprivation of any person of property without due process of law?

Constitutional Provisions and Ordinances Involved

The constitutional provisions involved are:

1. The United States Constitutional Amendment 14, Section 1 "* * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *"

2. The United States Constitutional Amendment number five "* * * nor shall private property be taken for public use, without just compensation."

3. Texas Constitution, Article 1, Section 17, "No person's property shall be taken, damaged or destroyed for or applied

to public use without adequate compensation being made, unless by the consent of such person * * *"

4. Ordinance of the City of Abilene No. 569 dated April 2nd, 1954, and recorded in Volume 5, Page 364, of the Ordinance Records of the City of Abilene "ORDINANCE PROHIBITING PARKING ON SOUTH FIRST STREET, BETWEEN TREADAWAY BOULEVARD AND THE WEST CITY LIMITS; REGULATING TRAFFIC MOVEMENTS; PROVIDING FOR PENALTY; AND CALLING PUBLIC HEARING.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF ABILENE, TEXAS:

SECTION 1: That all parking on South First Street in the City of Abilene, Texas, between Treadaway Boulevard on the east and the City Limits of the City on the west, is hereby prohibited and declared to be a traffic violation as of July 1, 1954.

SECTION 2: That all left turn and traffic movements shall be prohibited, as traffic studies warrant and dictate, in connection with good traffic planning.

SECTION 3: That any violation of this ordinance is hereby declared to be a traffic violation, and may be enforced by a fine not to exceed $200.00.

PASSED ON FIRST READING this 26th day of February, 1954.

After said passage, notice of the time and place when and where said ordinance would be considered for final passage, was published in "The Abilene Reporter-News", a daily newspaper of general circulation in the City of Abilene, said publication being on the 2nd day of March, 1954, at least one week prior to the time advertised, and the caption of said ordinance

having been published for three successive days in said newspaper, being the 2nd, 3rd, and 4th days of March, 1954. After such opportunity for the public to be heard, said ordinance was passed on its SECOND AND FINAL READING on the 2nd day of April, 1954.

(SEAL)

C. E. Gatlin,
Mayor

ATTEST:

Lila Fern Martin,
City Secretary

APPROVED AS TO FORM BEFORE PASSAGE:

N. Alex Bickley,
Corporation Counsel."

Said ordinance was amended May 20th, 1955, by Ordinance No. 641, which omitted Section 2 of the original ordinance dealing with left hand turns but retained the Section prohibiting all parking, so as to read as follows:

"Ordinance No. 641

AN ORDINANCE AMENDING ORDINANCE NO. 569; PROHIBITING PARKING ON SOUTH FIRST STREET, BETWEEN TREADAWAY BOULEVARD AND THE WEST CITY LIMITS; PROVIDING FOR PENALTY; AND DECLARING AN EMERGENCY.

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF ABILENE, TEXAS:

SECTION 1: That Ordinance No. 569 passed on second and final reading on the 2nd day of April, 1954, and recorded in Volume 5, Page 364 of the Ordinance Records of the City of Abilene is hereby amended to read as follows:

SECTION 2: That all parking on South First Street in the City of Abilene, Texas, between Treadaway Boulevard on the east and the City Limits of the City on the west, is hereby prohibited and declared to be a traffic violation, as of July 1, 1954.

SECTION 3: That any violation of this ordinance is hereby declared to be a traffic violation, and may be enforced by a fine not to exceed $200.00.

PASSED ON FIRST READING on the 20th day of May, 1955.

After the passage of said ordinance on first reading, it being deemed necessary to pass this ordinance to meet an emergency in accordance with Section 32 of the Charter of the City of Abilene, the rule requiring publication at least one week prior to a public hearing and requiring such hearing, was suspended by vote of four members of the Board of Commissioners, and said ordinance was read and passed on second and final reading on the 20th day of May, 1955.

(SEAL)

A. C. Scott,
Mayor Protem.

ATTEST:

Lila Fern Martin,
City Secretary

APPROVED AS TO FORM BEFORE PASSAGE:

N. Alex Bickley,
Corporation Counsel."

Statement of the Case

After the above ordinance was passed the petitioners herein filed suit against the City of Abilene in the District Court of

Taylor County, Texas, for the 42nd Judicial District praying that the enforcement of said ordinance be enjoined and held for naught. The Federal question sought to be reviewed was raised in the District Court in Plaintiff's Original Petition Page 2 as follows: "That said ordinance is a specific violation of the Federal Constitution which guarantees to every person equal protection under the law and that no person shall be deprived of his life, liberty or property except by due process of law."

The Federal question was again raised in the Trial Court in Plaintiff's First Amended Original Petition in paragraph five in the same wording as quoted above. The Trial Court in its judgment found as follows: "It is therefore ordered, adjudged, and decreed by the Court on this 21st day of December 1954 that said ordinance is wholly null and void and unenforceable * * *". Also the Trial Court in its Findings of Fact and Conclusions of Law (Exhibit B) stated as its conclusion of law, "The Court finds that the ordinance is unconstitutional and, therefore, the plaintiffs are entitled to a judgment and it is so ordered and a judgment has been entered." The judgment of the Trial Court was, therefore, favorable to the petitioners herein. The case was appealed to the Court of Civil Appeals for the 11th Supreme Judicial District of Texas. Petitioners there urged the Federal question in their brief, no pleadings by them being required. The judgment of the Court of Civil Appeals reversed the judgment of the Trial Court and rendered it in favor of the City of Abilene. The opinion of the Court, however, did not specifically pass on the Federal question but held that a City in exercise of its power to regulate traffic on its streets, also may absolutely prohibit parking thereon. The Federal question was again raised by petitioners in their Application for Writ of Error to the Supreme Court of Texas and in their Motion for Rehearing on said applica-

tion. The Supreme Court of Texas rendered no opinion in the case, but affirmed the judgment of the Court of Civil Appeals by refusing the Application for Writ of Error and overruling the Motion for Rehearing thereon.

Argument

This case originated in the 42nd District Court of Taylor County, Texas, where the Trial Court held the ordinance in question unconstitutional and void. On appeal to the Court of Civil Appeals that Court reversed and rendered the judgment of the Trial Court. Whereupon, Woodlock, et al, filed their Application for Writ of Error which was denied, and the judgment of the Court of Civil Appeals became final. The case comes to you for a judicial determination of the legality of the following ordinance:

> "That all parking on South First Street in the City of Abilene, Texas, between Treadaway Boulevard on the East and the city limits on the West is hereby prohibited and declared to be a traffic violation as of July 1, 1954."

The Court of Civil Appeals erred in holding that the City had the power to prohibit parking on South First Street, and erred in holding that the power delegated to the City to regulate traffic includes the power to prohibit.

South First Street runs through the City from East to West. Highway 80 is located on this street. The South First Street property all faces this street and is practically all used for business purposes. The petitioners are contending that this ordinance is a violation of the due process clause of the Federal Constitution.

The authority delegated to the City by the Texas legislature and by the City Charter gives to the City the power to regulate traffic on its streets, and the question presented here is—does the delegation of the power to regulate give to the City power

to absolutely prohibit parking. We have found one case decided by an Appellate Court of any State in the American union directly on this point. Haggenjos vs. City of Chicago, 168 NE 661. An ordinance in Chicago did not absolutely prohibit parking as does the ordinance here. The Chicago ordinance prohibited parking from seven a. m. to six p. m. This ordinance complained of here prohibits any parking of any kind at any time 365 days a year, every year from now on. Petitioners contend that the effect of this ordinance is the taking of their property without due process of law, in violation of Amendment 14 of the Federal Constitution. We have many judicial determinations of this question in one way and another, such as; Birmingham vs. Hood McPherson Realty Company, 172 Southern 114, where the Court said:

> "The right of access includes passage, accessability, and stopping briefly and reasonably in front of the premises without unnecessarily inconveniencing the passage of the general public, 44 Corpus Jur. Page 943, and this right is applicable not only to the passenger along the street or one deciding to approach and enter the premises but also to the owner of the premises. The latter has the right to have his family, guests, or customers come and go within reasonable limitations.

American Jur., Vol. 25 Page 602, Section 903, states the rule:

> "an abutting owner has the right to park his own vehicle on the street in front of his premises for the accommodation of himself, his customers, or his guests in a reasonable manner and to a reasonable number."

The power to regulate does not confer upon the City the power to destroy. The City wants to enforce here prohibition of parking not regulation. The City wants to confiscate private property without paying for it. The rule is:

"an ordinance which permanently so restricts the use of property that it cannot be employed for any reasonable purpose goes, it is plain, beyond regulation and must be recognized as a taking of private property." Williams vs. Cook, 130 Pac. 828; Smith vs. Atlantic 132 SE 66; Bettey vs. Sidney, 257 Pac. 107; Averne vs. Thatcher, 15 NE 2d 587; American Jur. Vol. 37, Page 923, Section 286.

Our constitution makes no reference to the police power. That is the doctrine on which the Court of Civil Appeals decided this case.

Police power is a Court made doctrine set up from necessity. Of course, this Court is well familiar with the Judge-made law of the power of police regulation, but even under the police regulation, the law still protects private property, and if the court thinks in a condemnation proceeding that it is necessary to take private property for public use, then the only requirement is for the government to pay for it. They have not done that here and do not propose to do it. The effect of the prohibition, your Honors, has been to make bats' nests out of the buildings along this street and paupers out of their owners. It is squarely in the teeth of the constitution that private property shall not be taken for public use without adequate compensation. Ruling case Law, Vol. 13, Page 144, states the rule:

"Regardless of whether the fee of the street or highway is in the abutting owner or in the public, such an owner has a special easement therein for the purpose of ingress and egress which is property as much as the abutting lot itself and which cannot be taken away or materially impaired or interferred with even under legislative authority without compensation to him therefor."

I checked the index to our Federal constitution and do not see where police power is above the constitution but in every ex-

pression of the law it seems to be that the police power is also subject to control by the constitution. That government must have police power cannot be denied, but in the exercise of the police power, the government must pay for the property taken. Cattle with the Foot and Mouth disease gives the government the power to take and kill those cattle, but the government pays for them, and the same is true in many instances where the protection of the people must be exercised. Fighting a war is part of the police power, but the constitution says that the Congress has the power to declare a war. In all the books I have been able to find, I have never found the statement that anybody had the power to suspend the constitution and take private property without paying for it, and that is our complaint here. Your Honors, we have a righteous complaint. We have exhausted our efforts in the State Court, and we ask that this petition be granted and this doctrine be rejected and this case reversed and the judgment of the Trial Court be affirmed.

Respectfully submitted,

By_____

DALLAS SCARBOROUGH
Counsel for Petitioners

Exhibit A

IN THE DISTRICT COURT OF TAYLOR COUNTY, TEXAS, 42ND JUDICIAL DISTRICT

* * *

E. D. WOODLOCK, ET AL

vs.

THE CITY OF ABILENE

NO. 19,939-A

* * *

JUDGMENT

* * *

On the 1st day of October 1954 regularly came on to be heard the above entitled and numbered cause wherein the plaintiffs are E. D. Woodlock, H. W. Cox, S. O. Broach, William F. Thomas, John A. Ponder, L. M. Nichols, M. E. Nichols, John W. Odom, R. B. Leavitt, Jack Young Motors, Inc., Compere Tire Company, J. G. Johns, Adrian Allen, D. P. Hanks, Guitar Trust Estate, O. C. Bloss Finance Co., Bob Horton, Ace Loan Company (S. B. Bloss), Danny Nichols Cash Loan, L. A. Greer, E. L. Garner, J. R. Toney, Harry Goltz, I. P. Roberts, Austin Boyd, Radford Properties (H. M. Harrison, agent), and wherein the City of Abilene, a municipal corporation of Taylor County, Texas, is defendant, and came the parties by their attorneys and announced ready for trial on the merits and with respect to the prayer of plaintiffs for a permanent injunction herein and the Court having heard the pleadings read, the evidence adduced, and the argument of counsel is of the opinion and finds that the purported city ordinance of defendant City of April 2, 1954, attempting to prohibit all parking of vehicles on South First Street in the City

of Abilene between Treadaway Boulevard on the east and the city limits on the west is null and void. And it further appearing that the plaintiff property owners because of their ownership of property adversely affected by the enforcement of said ordinance have an interest peculiar to themselves as distinguished from the general public, and that therefore plaintiffs are entitled to an injunction as prayed for.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court on this ..... day of December, 1954, that said ordinance is wholly null and void and unenforceable; and,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the defendant be, and it is hereby permanently enjoined from enforcing or attempting at any time to enforce said ordinance.

To all of which the defendant then and there in open Court excepted and gave notice of appeal to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland, Texas.

FLOYD JONES, Judge of the 90th District Court Sitting in 42nd District Court on Exchange of Benches with Honorable J. R. Black, Judge of said Court.

Exhibit B

IN THE DISTRICT COURT OF TAYLOR COUNTY, TEXAS, 42ND JUDICIAL DISTRICT

* * *

E. D. WOODLOCK, ET AL

vs.

CITY OF ABILENE

NO. 19,939-A

* * *

In response to the request by counsel for the City of Abilene, The Court files its Findings of Fact and Conclusions of law.

FINDINGS OF FACT

The Court finds that the City of Abilene passed an ordinance attempting to regulate the traffic on South 1st Street in the City of Abilene from Treadaway Blvd. on the East to the City limits on the West. Said ordinance being attached hereto and marked Exhibit "A".

Second: The Court finds that as a fact the prohibition of parking on South 1st Street would seriously damage the cash market value of the plaintiffs' property, and the City has made no effort to pay an adequate consideration for the damage that will be done to the property by the enforcement of such an ordinance.

Third: The Court finds as a fact that South 1st Street had parking space along the South side of the street in front of and adjacent to the plaintiffs' property, and that in addition thereto, the street had four (4) lanes for traffic, two to the East and two to the West. The Court finds that as a fact at about 5:00 o'clock in the afternoon the traffic was heavy on this

street, but did not seriously congest the traffic. That the Court finds that there is no serious congestion of traffic at any other time of the day, and the 5:00 o'clock traffic congestion is a very short period of time, and not serious in that.

CONCLUSIONS OF LAW

The Court finds that the ordinance is unconstitutional and, therefore, the plaintiffs are entitled to a judgment and it is so ordered and a judgment has been entered.

District Judge Floyd Jones, Sitting for District Judge, J. R. Black.

Exhibit C

JUDGMENT

City of Abilene
vs. No. 3182
E. D. Woodlock, et al

From the 42nd District Court of
Taylor County, Texas

September 9, 1955

Opinion by Collings, A. J.

This case came on to be heard on the transcript of the record and, the same being inspected, it is the opinion of the Court that there was error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be and the same is hereby reversed and judgment is rendered for appellant, in accordance with the opinion of this Court. It is further ordered that all costs incurred by reason of this appeal be, and the same are hereby, taxed against Appellees, E. D. Woodlock, H. W. Cox, S. O. Broach, William F. Thomas, John A. Ponder, L. M. Nichols, M. E. Nichols, John W. Odom, R. B. Leavitt, Jack Young Motors, Inc., Compere Tire Company, J. G. Johns, Adrian Allen, D. P. Hanks, Guitar Trust Estate, O. C. Bloss Finance Co., Bob Horton, Ace Loan Company, Denny Nichols Cash Loan, L. A. Greer, E. L. Garner, J. R. Toney, Harry Goltz, I. P. Roberts, Austin Boyd, Radford Properties, for which let execution issue, and that this decision be certified below for observance.

Exhibit D

City of Abilene

Appellant

vs. No. 3182

E. D. Woodlock, et al

Appellees

Appealed from the 42nd District Court of Taylor County, Texas.

The City of Abilene, on April 2, 1954, by ordinance prohibited the parking of automobiles on South First Street between Treadaway Boulevard and its western city limits. E. D. Woodlock and other appellees who own places of business on the South First Street, filed a petition in the District Court seeking to enjoin the City from enforcing the ordinance. Upon a trial of the cause the court declared the ordinance null and void and permanently enjoined its enforcement. The City of Abilene has appealed.

The material portion of the ordinance is as follows:

> "Section Two: That all parking on South First Street, in the City of Abilene, Texas, between Treadaway Boulevard on the east and the city limits on the west, is prohibited and declared to be a traffic violation . . ."

In several points appellant City contends that the Court erred in striking down the ordinance. It is urged that under statutory and charter provisions the City is vested with police power under which it has the right by ordinance to regulate and prohibit parking on its streets as long the ordinances are not arbitrary and unreasonable; that this ordinance is not arbitrary or unreasonable and should have been upheld.

The principal purpose of a city street is to furnish a place or way for public passage of traffic on foot or in vehicles transporting persons or moving property, and as incident thereto, the right to load and unload passengers, merchandise and other commondities. Harper vs. City of Wichita Falls, 105 S. W. (2d) 743 (Writ Ref.); Town of Refugio vs. Strauch, 29 S. W. (2d) 1041 (Com.); Taylor vs. Dunn, 80 Tex. 652, 16 S. W. 732.

The City of Abilene is a municipal corporation with home rule charter. Article XII, Section 97 of the charter provides as follows:

> "The Board of Commissioners shall have power to lay out, establish, open, alter, widen, extend, grade, narrow, care for, pave, supervise, maintain, and improve streets, alleys, sidewalks, parks, squares, public places and bridges within the City of Abilene, and shall have exclusive power and control over the same; to prevent and summarily abate any obstruction or encroachment thereon, to sprinkle and care for said street, etc., and to regulate and have power exclusive over the use thereof . . ."

Article 1175, Sec. 16, Vernon's Annotated Civil Statutes, provides that home rule cities in this state shall have:

> ". . . exclusive dominance, control and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards and public grounds of such city and to provide for the improvement of any public street . . ."

Section 18 of the same Article gives such cities the power to:

> "control, regulate and remove all obstructions or other encroachments or encumbrances on any public street, alley or ground . . ."

Under the above charter and statutory provisions a municipal corporation such as the appellant City of Abilene has the power by ordinance to provide reasonable regulations as to the use of its streets and traffic thereon, and has the duty under

its policy power to make proper regulations for the convenience and protection of the public. 39 Tex. Jur. 612, 615; Dallas Railway and Terminal Company vs. Bankston (Con.) 51 S. W. (2d) 304; Fletcher vs. Bordelon, 56 S. W. (2d) 313 (Writ Ref.); Clark vs. City of Athens, 253 S. W. 574 (Writ Dis.).

Appellees recognize the right of the City to regulate traffic on its streets and also its right to regulate parking. They contend, however, that the City does not have the power to absolutely prohibit parking and cite as authority two cases by the Supreme Court of Illinois, Haggenjos vs. City of Chicago, 168 NE 661 and City of Chicago vs. McKinley, 176 NE 261. In the first of these cases the ordinance involved made it a violation "to cause or permit any vehicle to stand" on any public street or alley in the territory described during the period of time covered by the ordinance. This ordinance was held to be unreasonable and invalid. In the McKinley case the ordinance prehibited and made it a violation "to cause or permit any vehicle to stand for a period of time" longer than was reasonably necessary for the loading and unloading of passengers and merchandise, and specified the maximum time permitted for such loading and unloading. The ordinance in that case was upheld. The court, in the latter case, distinguished the cases by pointing out that the ordinance in the Haggenjos case was unreasonable and invalid because it prohibited any standing of vehicles on the street, while the ordinance in the McKinley case, though it also prohibited standing, allowed stopping for a reasonable time for discharge and taking on of passengers and for loading and unloading materials.

The right to make such reasonable temporary stops is incident to the right of the public to travel the streets. Harper vs. City of Wichita Falls, supra. The ordinance in the Haggenjos case denied this right and was, therefore, invalid. The ordinance in the McKinley case was not subject to this criticism and

was upheld, although it was noted by the Supreme Court in that case that the effect of the ordinance was a "total prohibition of the use of the street for parking or storing of vehicles."

The ordinance of the City of Abilene here under consideration is likewise *not subject to the vice of the ordinance in the Haggenjos case.* This ordinance does not prohibit vehicles from standing or stopping on South First Street but prohibits parking thereon. *Parking* has been held to mean the use of a portion of a street as storage space not only when a vehicle is voluntarily left unattended but, also, when occupied, if the stopping of the vehicle is for a length of time inconsistent with a reasonable use of the street, considering the primary purpose for which streets exist. 31 Words and Phrases, 97, and cases cited. The ordinance here involved which prohibits parking on South First Street in the City of Abilene does not deny the right to make temporary stops for reasonable lengths of time for loading and unloading passengers and merchandise and is valid under the holding in the McKinley case.

There is other authority for the rule that a City may, in the exercise of its power to regulate traffic on its streets also regulate and prohibit parking thereon in a manner which is reasonable and necessary for public safety and convenience. 64 C. J. S. 211, 214; City of Clayton vs. Nemours, 164 S. W. (2d) 935 (No.).

It is a well recognized general rule that it is the province of the governing body of municipality to determine in the first instance the necessity and reasonableness of such an ordinance. The burden of showing that the ordinance is unreasonable is on the party who attacks it, and the courts will not strike it down unless it clearly appears to be arbitrary and unreasonable and an abuse of power. New Braunfels vs. Waldschmidt, 109 Tex. 302, 207 S. W. 303; San Antonio vs. Fetzer, 241 S. W.

1034 (Writ Ref.); Town of Ascarate vs. Villalobos, 148 Tex. 254, 223 S. W. (2d) 945.

The question of the unreasonableness of a regulation under police power is discussed in 30-A Tex. Jur. 364, 365, as follows:

> "... to be valid as an exercise of this power, an ordinance must be reasonable in its operation upon the person whom it affects, and must not be unduly oppressive—that is, it must appear that the means adopted are reasonable, necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power."

South First Street in the City of Abilene, on which the ordinance in question prohibits parking, is a portion of transcontinental Highway U. S. 80. The street carries a large amount of both local and through traffic. Some witnesses indicated that there was at the time of the trial a maximum load of traffic on the street and that a great increase is expected when the Air Base now under construction west of the City is completed; that, in their opinion, it is hazardous to have parking on the street.

The evidence in our opinion does not show that the ordinance is unnecessary and unreasonable. The police power sought to be exercised by the City under the ordinance is concerned with the safety and convenience of the public in traveling its streets. The prohibition of parking on South First Street was appropriate to that purpose, in that, it was reasonably calculated to relieve congestion of traffic thereon. It was justified if it was reasonably necessary for public safety and convenience under the circumstances. The evidence concerning traffic on the street and the hazard to the public caused by parking is such that reasonable men might well conclude that the ordinance prohibiting parking is necessary and desirable for the safety and convenience of the public. This constitutes substantial evidence reasonably supporting the action of the

governing body of the City of Abilene in passing the ordinance.

Under such circumstances it cannot be said that the ordinance is unreasonable and arbitrary. Its purpose and effect is to regulate traffic on South First Street. The subject matter is within the realm of the City's police power and there is substantial evidence in support of the need for such regulation. The fact that reasonable men might differ on the desirability or merits of the ordinance does not destroy the power to make the regulation. On the contrary, where the subject matter is, as here, within the scope of the police power and there is substantial evidence in support of the regulation, the question then becomes one of governmental or legislative discretion, and the Court will not substitute its discretion for that of the governing body of the City. 16 C. J. S., Constitutional Law, Par. 198, page 569; Railroad Commission vs. Shell Oil Company, 139 Tex. 66, 161 S. W. (2d) 1022, 1029; City of Coleman vs. Rhone, 222 S. W. (2d) 646 (Writ Ref.), and cases cited.

The judgment of the trial court is reversed and judgment rendered in favor of the City of Abilene.

Cecil C. Collings,
Associate Justice.

September 9, 1955.